



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 15, 1995

Mr. Leon Evans
Executive Director
Tri-County Mental Health
Mental Retardation Services
P.O. Box 3067
Conroe, Texas 77305

OR95-278

Dear Mr. Evans:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a). Your request was assigned ID# 27575.

The Tri-County Mental Health Mental Retardation Services ("Tri-County") received a request for information regarding a former employee. You have submitted two documents to our office for review in response to the request for information. You claim that Tri-County has no other documents responsive to this request.¹ Tri-County claims that it has no obligation to respond to a request for information under the Open Records Act made by a prison inmate. In the alternative, you claim the requested information is excepted from required public disclosure under sections 552.101, 552.102, and 552.108 of the Government Code.

We note that although you contend that Tri-County is under no obligation to respond to an open records request made by a prison inmate, you admit that Tri-County would have no objection to releasing the submitted documents to any other member of the public. The Open Records Act prohibits a governmental body from inquiring into the

¹The Open Records Act applies only to information in existence and does not require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992), 572 (1990), 558 (1990).

motives of the person applying for inspection or copies of records, and requires the governmental body to treat each request uniformly without regard to the position or occupation of the requestor. Gov't Code §§ 552.222, .223; *see also* Open Records Decision No. 542 (1990) at 4. Accordingly, you may not refuse to comply with this request for information based on the fact that the requestor is a prison inmate.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In response to the request for the social security number of the former employee, you have submitted a W-4 Form. Title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms); 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989) *aff'd in part and vacated in part on other grounds*, *Mallas v. United States*, 993 F.2d 1111 (4th Cir. 1993); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Accordingly, Tri-County must withhold the W-4 Form from required public disclosure under section 552.101 of the Government Code. The other document submitted for our review is the former employee's resignation letter. You do not indicate any law that would make this information confidential nor are we aware of any. You may not, therefore, withhold the resignation letter under Government Code section 552.101 as information made confidential by law.

Section 552.101 also incorporates the common-law right of privacy. In order for information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing section 3(a)(1) of former article 6252-17a, V.T.C.S.). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Section 552.102 excepts:

(a) . . . information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

(b) . . . a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e. Accordingly, we will consider the arguments for withholding information from required public disclosure under common-law privacy as incorporated by section 552.101 and section 552.102 together.

We have reviewed the resignation letter submitted to this office. We believe there is a legitimate public interest in the information. See Open Records Decision No. 444 (1986). Tri-County bases its claim that the information is private solely on the alleged motives of the requestor. Although we sympathize with your concern for a former employee, as we stated above, the motives of the requestor are not relevant to an analysis under the terms of the Open Records Act. See Open Records Decision No. 542 (1990) at 4. You may not withhold the resignation letter under the doctrine of common-law privacy as incorporated by section 552.101, nor under section 552.102.

Finally, you claim that section 552.108 excepts this information from required public disclosure. Section 552.108 provides that:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

Where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to the incident. Open Records Decision Nos. 474 (1987); 372 (1983). Certain factual information generally found on the front page of police offense reports, however, is public even during an active investigation. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) at 3-4 (list of factual information available to the public).

After a file has been closed, either by prosecution or by administrative decision, the availability of section 552.108 is greatly restricted. Open Records Decision No. 320 (1982). The test for determining whether information regarding closed investigations is excepted from public disclosure under section 552.108 is whether release of the records would unduly interfere with the prevention of crime and the enforcement of the law. Open Records Decision No. 553 (1990) at 4 (and cases cited therein). A governmental body claiming the "law enforcement" exception must reasonably explain how and why release of the requested information would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 434 (1986) at 2-3.

Tri-County is not a law enforcement agency, nor does the information relate to an active investigation. Furthermore, although we understand your concerns about the possible harassment of the former employee, we do not believe that the particular information in question could be used for such a purpose or that its release could jeopardize the safety of that individual. Accordingly, you must release the resignation letter to the requestor in its entirety. As noted above, the W-4 Form is made confidential by federal law and must not be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo", with a stylized flourish at the end.

Kay H. Guajardo
Assistant Attorney General
Open Government Section

Ref.: ID# 27575

Enclosures: Submitted documents

cc: Mr. Michael Noonan
TDC No. 619340
Wynne Unit
Huntsville, Texas 77349
(w/o enclosures)